IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 513

ELLIOTT V. BELL, Superintendent of Banks of the State of New York, as Liquidator of the business and property of Yokohama Specie Bank, Ltd., in the State of New York,

Petitioner,

against

BANQUE MELLIE IRAN

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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To the Honorable, the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States.

Your petitioner, ELLIOTT V. BELL, Superintendent of Banks of the State of New York, as Liquidator of the business and property of Yokohama Specie Bank, Ltd., in the State of New York, prays that a writ of certiorari issue to review a judgment of the Court of Appeals of the State of New York in the within action dated April 15, 1949 (R. 365).*

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*References in parentheses are to pages of the Record on Appeal.

Opinions Below.

The opinion of the Supreme Court, County of New York, was reported in 188 Misc. 346 (R. 322); that of the Court of Appeals in 299 N. Y. 136 (R. 351), motion for reargument denied 300 N. Y. 459 (R. 364). No opinion was rendered by the Appellate Division—see 274 App. Div. 768 (R. 348).

Question Presented.

The question presented by this petition is identical with the question presented by the petition in the companion application in the case of *Bell* v. *Singer*, which is being filed concurrently herewith, viz: does Presidential Executive Order No. 8389 (the Freezing Order) issued pursuant to Section 5(b) of the Trading with the Enemy Act of October 6, 1917 and the rules and regulations issued pursuant thereto prevent the accrual or creation of a claim predicated upon a transaction prohibited by such Order, and render such claim void?

Plaintiff sued to establish a claim against the New York Agency of a foreign banking corporation in liquidation. The Court of Appeals held:

(a) that the claim asserted by plaintiff rests upon a transaction prohibited by the provisions of Executive Order No. 8389, as amended, and the rules and regulations issued pursuant thereto,

(b) that such Order, rules and regulations do not prevent the accrual or creation of such claim or render it void, but merely prevent payment thereof until an appropriate federal license is obtained, and

(c) that no such license has been issued.

Your petitioner seeks review of the second of these holdings.

Jurisdiction of this Court.

The judgment of the Court of Appeals of the State of New York was rendered on April 15, 1949. A motion for reargument was made on July 8, 1949. This motion, after due deliberation upon duly submitted papers, was denied on October 6, 1949 (R. 364). The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. C. Section 1257.

The federal question as to which review is sought was presented to and necessarily passed upon by the New York courts. The provisions of the Executive Order were pleaded as a complete and separate defense in the answer of the Superintendent (R. 221-4). This defense was briefed and argued to the Supreme Court, the Appellate Division and the Court of Appeals by both the Superintendent and the plaintiff as well as by the federal government as *amicus curiae*. The motion for reargument was devoted exclusively to this question (R. 358).

Although the opinion of the Court of Appeals does not deal explicitly with this question, but simply refers to the decision of that Court in the companion case of *Singer* v. *Yokohama Specie Bank, Ltd.* (*Bell* v. *Singer* in this Court), its holding on this issue is explicitly set forth in the amended remittitur issued by it on July 19, 1949. This reads as follows (R. 356):

> "A federal question was presented and necessarily passed upon by this Court, viz: it was held that the provisions of Executive Order No. 8389, as amended, and the rules and regulations issued pursuant thereto did not prevent the accrual or creation of the claim sued upon or render such claim void, but merely prevented the payment of the claim until an appropriate federal license is obtained, and that the documents in evidence do not constitute such a license."

It will be observed that this question is identical with the question presented in the companion case of *Bell v. Singer.*

Statutes Involved.

The relevant provisions of Section 5(b) of the Trading with the Enemy Act, as amended, and of Executive Order No. 8389, as amended, and of the rules and regulations issued pursuant thereto, and of the Banking Law of the State of New York are set out in the appendix to the petition being filed concurrently herewith in *Bell* v. *Singer*, and the Court is respectfully referred thereto. A copy of that petition is being served upon the attorneys for the plaintiff in this action.

Summary Statement of the Matter Involved.

Synopsis of Facts

This action was brought by Banque Mellie Iran, an Iranian corporation [Complaint, par. 1, (R. 205)] to establish its right to participate in the liquidation of the New York Agency of the Yokohama Specie Bank, Ltd. The Yokohama Specie Bank, Ltd., was a Japanese banking corporation with its head office in Yokohama and with branches in various other cities in Japan and other countries (R. 205, 235). Prior to the war this corporation, pursuant to license granted by the Superintendent of Banks, maintained an agency in the City of New York which was authorized to conduct a limited banking business in that state (R. 236). On the outbreak of the war, the Superintendent, pursuant to Section 606(4) of the Banking Law, took possession of this New York Agency for the purpose of liquidation (R. 236).

The complaint contains three causes of action (R. 205). The first cause of action seeks the recovery of items aggregating $112,461.27, the third of a single item of $3,791.00. The second cause of action duplicates the first and may therefore be disregarded.

The plaintiff's claim is based on certain events which took place in 1941. In the early part of that year plaintiff, on behalf of various of its customers, opened a number of letters of credit in favor of certain exporters in Japan. By a series of cables directed to the Nagoya, Osaka and Tokyo branches of The Yokohama Specie Bank, Ltd., in Japan (hereinafter sometimes referred to collectively as the "Foreign Branches") plaintiff requested these branches to notify the beneficiaries of the opening of the credits without "confirmation", [i.e., without assuming any liability therefor (R. 27)], and advised them that it had cabled "Irving Trust New York" to "remit you cover telegraphically" [i.e., to remit funds to the Japanese branches with which to make payments under the letters of credit (R. 256)]. [Sadri, Exs. A-1 to M-1 (R. 169, 174, 176, 177, 178, 180, 183, 184, 185, 186, 187, 188)].

In order to furnish these branches with such funds, plaintiff cabled the Irving Trust Company of New York (hereinafter sometimes referred to as "Irving") to remit to the Foreign Branches in Japan the amounts of the letters of credit involved [Kearns, Exs. B-1 to B-11 (R. 267-70), Bayles, Ex. L (R. 302)], and, thereupon Irving, which was free to remit through any bank it chose (R. 306, 312) made a series of payments to the New York Agency, in aggregate amounting to $117,162.27, for transmission to the Foreign Branches [Burns, (R. 305-7); Estrin, Exs. A-1 to A-12 (R. 28-35)]. The New York Agency duly transmitted these funds by cable to the Foreign Branches

[Kearns, (R. 251-8); Holzka, Exs. A-1 to L-4 (R. 44-139); Holzka, Ex. M (R. 140-1)]. The transmissions were all completed prior to July 26, 1941 [Kearns, (R. 257), Opinion, (R. 351)].

The credits, however, were not utilized by the beneficiaries prior to their expiration dates (with the exception of $1000 under credit #12/5613) and, subsequent to July 26, 1941, plaintiff requested the Foreign Branches to remit to Irving for the account of plaintiff the unutilized portions of the credits, amounting in all to $116,162.27 [Sadri, Exs. A-4 (R. 172), B-4 (R. 175), C-3 (R. 177), D-2 (R. 177), E-3 (R. 178), E-4 (R. 179), F-6 (R. 182), F-7 (R. 182), G-2 (R. 183), H-2 (R. 184), I-2 (R. 185), J-2 (R. 186), K-2 (187), K-3 (R. 187), L-2 (188), M-3 (189)].

Upon receipt of such requests, the Foreign Branches sent a series of cables to the New York Agency, instructing it to pay to Irving Trust Company for the account of plaintiff certain of these sums, amounting in all to $112,205.30 [Kearns (R. 259-61); Holzka, Exs. N-1 to N-7 (R. 142-55)]. The Agency would normally have carried out such instruction by debiting on its books the accounts of the several branches involved with the amounts of the indicated payments, and transferring the credits thus released to the account of the Irving Trust Company on its books [Kearns (R. 263)].

However, prior to the time that the New York Agency received these instructions, and on July 26, 1941, Japanese funds were frozen by the United States Government and a national bank examiner was placed in charge of the Agency [Kearns, (R. 259)]. By the terms of the Freezing Order (Executive Order 8389) and the instructions issued thereunder, the New York Agency was prohibited from carrying out the instructions received from the Foreign Branches without first obtaining the approval of the appropriate

officials and the issuance of appropriate Treasury licenses [See Kearns, (R. 261, 259, 264); Burns, (R. 308)].

Accordingly, from time to time upon receipt of the first of such instructions, the Agency filed a series of four applications with the Treasury Department for licenses authorizing it to debit the accounts of the remitting branches and pay to Irving for account of plaintiff sums aggregating $8,710.00, representing the unutilized portions of six of the credits [Kearns, (R. 261-2); Kearns, Exs. D (R. 273-6), F (R. 280-1)]. Between October 1, 1941 and November 1, 1941, all of these applications were denied and Irving was so notified [Kearns, R. 261-2)].

Thereafter Irving itself made an application to the Treasury Department for a license [Hinerfeld, Ex. C, (R. 249)], and in connection with this application the Agency, by letter of December 2, 1941, confirmed to Irving that it had theretofore received instructions from the several Foreign Branches to pay Irving amounts aggregating $110,465.77* "provided we are duly authorized by the Treasury Department to do so" [Estrin, Ex. B, (R. 36)].

Irving's original application was mislaid and on December 16, 1941, a supplemental application was filed [Hinerfeld, Ex. C (R. 249); Kearns, Ex. H-1 (R. 283-6)]. No action was taken by the Treasury upon this application [Kearns, Ex. H-2 (R. 287)].

No entries were ever made on any of the books or records of the Agency with respect to the receipt of the

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* Thereafter the Agency received instructions to refund an additional item of $1,739.53 [Holzka, Ex. N-3, (R. 147)]. The total amount that the Agency was instructed to refund therefore was $112,205.30. This is the amount of the judgment obtained by plaintiff (R. 365). No instructions were received as to items of $255.97 and $3,710.00 [Kearns, (R. 260)] and the complaint was dismissed as to these items (R. 9).

instructions from the Foreign Branches, nor were such instructions reflected in any manner in any of its books of account. None of the entries reflecting the original cable transfers to Japan were ever reversed, cancelled or placed in suspense [Kearns, (R. 264)]. No payments were ever made by the Agency to Irving [Complaint, pars. 16, 28, (R. 209, 212), Answer, par. 9, (R. 216)].

On December 8, 1941, the Superintendent took possession of the Agency for the purpose of liquidation [Hinerfeld (R. 236)]. On January 14, 1942, he obtained a Treasury license authorizing him to liquidate the assets and pay the creditors of the Agency, subject to the stipulation, among others, that transactions involving blocked nationals other than the Agency could be effected only as authorized by a general or specific license [Leary, Ex. B, (R. 194)]. This license was revoked by a letter from the Treasury Department dated October 29, 1942, which in terms authorized the Superintendent so far as the Treasury Department was concerned to engage in any transactions on and after such date which might be engaged in without a specific license of the Treasury Department by a person who was not a national of any blocked country [Leary, Ex. A (R. 192)], and which called attention to the possible applicability of rules and regulations of the Alien Property Custodian.

Shortly before the issuance of the letter of October 29, 1942 the Alien Property Custodian, without vesting the property of the Agency, undertook the supervision of its liquidation by the Superintendent [Leary, Ex. D (R. 198)]. He instructed the Superintendent to continue the liquidation and to submit claims to him prior to payment [Hinerfeld, Ex. B (242)]. Subsequent thereto and on February 15, 1943, the Custodian vested title to the excess proceeds of the assets in the hands of the Superintendent remaining

after the payment by the Superintendent of the creditors entitled to share in the liquidation of the New York Agency [Leary, Ex. E (R. 201)]. On August 25, 1942, the Superintendent called for the filing of claims [Complaint, par. 9 (R. 207)] and on November 4, 1942, plaintiff filed the proof of claim upon which this action is based [Hinerfeld, Ex. C, (R. 245-9)]. This claim was rejected by the Superintendent on February 11, 1943 [Complaint, par. 13, (R. 208)] and on August 7, 1943, plaintiff commenced this action (R. 2).

Prior Proceedings

Section 606(4) of the Banking Law of the State of New York provides that the only creditors of a foreign banking corporation who may participate in the liquidation of its New York assets are those whose claims arise out of a transaction with its New York Agency.* After such creditors (who are designated as "preferred") have been paid, the surplus remaining must be transmitted by the Superintendent to the principal office or domiciliary liquidator of the foreign corporation. Creditors of the corporation whose claims do not arise out of transactions with its agency must look for payment of their claims to such principal office or domiciliary liquidator (*Orvis* v. *Bell*, 294 N. Y. 844, aff'g. without opinion, 268 App. Div. 851 aff'g. without opinion, 182 Misc. 616).** In order for a claim to fall within the statutory preference the transaction out of which it arose must be such as to give rise to an enforcible

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* The statute also provides that creditors whose names appear as creditors on the books of the Agency may participate in its liquidation. Plaintiff's argument that its name did so appear on the books of the Agency was rejected by the court (R. 324).

** In the instant case, as indicated above, the Alien Property Custodian has vested the surplus remaining after the payment of "preferred" creditors [Leary, Ex. E (201)].

obligation against the agency (*Singer* v. *Yokohama Specie Bank, Ltd.*, 293 N. Y. 542).

The question to be determined in this case, therefore, was whether the New York Agency came under such an obligation and, in particular, whether the prohibitions of the federal freezing regulations served to prevent the accrual or creation thereof. On cross motions for summary judgment the Superintendent maintained that the attempted re-transmittal of funds from Japan to New York fell squarely within the provisions of the Executive Order concerning transfers of credit between banking institutions and transactions in foreign exchange and payments by and to banking institutions, and therefore could not serve as the basis of an enforcible legal obligation. He further maintained that such attempted remission of funds constituted an attempted transfer of an interest in blocked property within the meaning of General Ruling No. 12. This ruling declares that all such transfers after the effective date of the Order are "null and void" and cannot serve as a "basis for the assertion or recognition of any right, remedy, power or privilege" with respect to such property.

The Court of Appeals dealt with the foregoing contentions simply by stating that (R. 351):

> "Disposition of this appeal is controlled by our two decisions in *Singer* v. *Yokohama Specie Bank*, the one decided today * * *, the other in 1944 * * *.
>
> "Our decision on the first *Singer* appeal * * * dictated both the recognition of plaintiff's claim as a preferred one under the Banking Law and the direction that its principal amount be paid on condition that a license authorizing such payment be obtained from the Federal Government * * *.
>
> "Of course, even the amount to which plaintiff has established an accrued claim is not yet ripe for

payment. Recognize plaintiff's claim we may, but its payment must await authorization by the Treasury Department in accordance with Executive Order No. 8389 * * *".

In this fashion the court adopted the Superintendent's contention that the re-transmittal of funds from Japan to New York fell within the prohibitions of the Executive Order, but rejected the contention that the provisions of the Executive Order served to prevent the creation of an obligation based upon such a prohibited transaction. The federal question thus raised is identical with that involved in the *Singer* case. Any doubt with respect thereto is eliminated by the amended remittiturs, which are the same in both cases [R. 356, *Singer* Record, p. 541].

Specification of Errors to be Urged.

The Court of Appeals erred—

(1) in holding that the prohibitions of Executive Order No. 8389, as amended, and the rules and regulations issued pursuant thereto do not prevent the accrual or creation of an obligation predicated upon a prohibited transaction or render such transaction void, but merely prevent payment of such an obligation until an appropriate license is obtained, and

(2) in failing to direct the dismissal of the complaint.

Reasons for Granting the Writ.

Since the federal question presented by this case is identical with that presented in the *Singer* case, the reasons for granting the writ are likewise the same in both cases. Accordingly, we shall not repeat here the discussion con-

tained in the *Singer* petition with respect to such reasons, but respectfully refer this Court to pages 11 to 23 of that petition, wherein it is shown that the decision of the New York Court of Appeals is in direct conflict with the decisions of this and other federal courts and presents a question of major importance. A copy of the *Singer* petition will be served upon the attorneys for the plaintiff in this action.

Conclusion.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, December 28, 1949.

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